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IN THE

Supreme Court of the United States

October Term, 1939.

No. [redacted] 8

CRANE-JOHNSON COMPANY,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING INSTANTER AND PETITION FOR REHEARING.

JOHN E. HUGHES,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1939.

No. 584

CRANE-JOHNSON COMPANY,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Within the time for filing a petition for rehearing herein, this petitioner made a motion for an extension of time to file a rehearing petition until the end of the present term. This Court has not acted on said motion. Petitioner hereby amends said motion to move for leave to file the annexed petition for rehearing instanter. The reason for this motion is contained in the annexed petition.

All of which is respectfully submitted,

JOHN E. HUGHES,
Counsel for Petitioner.

PETITION FOR REHEARING.

Petitioner by its counsel moves that this Court allow this petition for rehearing, vacate the order denying the petition for the writ of *certiorari* and grant *certiorari* to the Circuit Court of Appeals for the Eighth Circuit.

The reason for this motion is that after the denial of *certiorari* herein and on March 1, 1940, the Circuit Court of Appeals for the Ninth Circuit rendered a decision in the case of *Northwest Steel Rolling Mills v. Commissioner* which is squarely in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar. That opinion expressly refuses to follow the case at bar.

It is published in the C. C. H. and Prentice Hall Tax Services but is not yet published in the Federal Reporter.

On pages 14 and 15 of the response to the petition for the writ a point is made by respondent which he concedes was not the basis of the decision below. The tribunals below decided the merits and would not have done so had respondent's point been well taken.

Respondent stipulated that there was a deficit of $21,251.40 (R. 12). Petitioner's net income was less than this deficit (R. 13, 14). Under the North Dakota statute, quoted on page 19 of the response to the petition, a dividend could only be declared from "surplus profits". As pointed out by the Court below (R. 42) this statute has

been construed by the State Supreme Court. The authority cited in Cook, relied upon at page 15 of the response, consists of English cases decided under a statute which allowed dividends to be paid from current profits irrespective of whether there was a surplus or not. American Statutes require a surplus. On this point see the petition for the writ and supporting brief herein.

There is no merit to this point made by respondent. It was properly ignored by the court below. It is submitted that the decision of a vital issue of national importance in taxation and on which the Circuit Courts of Appeal are in conflict should not be prevented by a meritless quibble which the court below did not deem worthy of notice.

All of which is respectfully submitted,

JOHN E. HUGHES,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1940.

Crane-Johnson Company, a Corporation of North Dakota, Petitioner,
vs.
Guy T. Helvering, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 12, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Because of a previously existing deficit, petitioner corporation was prohibited by state law[1] from distributing as dividends its profits earned in 1936. Notwithstanding this state prohibition, the Commissioner held respondent liable under the 1936 Revenue Act[2] for surtax on undistributed profits. The Board of Tax Appeals sustained the Commissioner,[3] and the Circuit Court of Appeals affirmed.[4] On a similar state of facts the Court of Appeals for the Ninth Circuit held undistributed profits exempt from surtax.[5] We granted certiorari in both cases to resolve this conflict.[6] The legal questions here presented are in all respects the same as those presented in *Helvering* v. *Northwest Steel Rolling Mills*, this day decided, and on the authority of that case the decision below is

Affirmed.

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1 "The directors of corporations must not make dividends except from the surplus profits arising from the business thereof . . . ." N. D. Comp. Laws (Supp. 1925) section 4543.

2 49 Stat. 1648, 1655.

3 38 B. T. A. 1355.

4 105 F. (2d) 740.

5 Northwest Steel Rolling Mills *v.* Commissioner, 110 F. (2d) 286.

6 309 U. S. 692; 311 U. S. —.